127-377

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 277.

FANNIE B. ALLEN, APPELLANT,

vs.

HENRY F. GILLETT, APPELLEE.

SUPPLEMENTAL ARGUMENT OF APPELLANT.

J. T. BRADY,
H. F. RING,
Counsel for Appellant.

Judd & Detweiler, Printers.

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SUPPLEMENTAL ARGUMENT OF APPELLANT.

We believe we have shown in our brief heretofore filed in this case that the law applicable to the facts admitted in defendant's answer clearly establishes the theory of our case, that Gillett, by his purchase of Mrs. Allen's interest, takes the property only as a resulting trust for her use and benefit, subject to the payment of his claim and without regard to *any question of fraud or good faith* pertaining to the transaction.

But as this may not be considered the only vital question on which the complainant's rights depend, the Court will please pardon us for submitting this as a further argument illustrative of this theory, as well showing other questions developed by the record.

In Cumberland Coal Company *vs.* Sherman, 30 Barbour, 569, Judge Davies, after quoting a number of high authori-

ties, uses the following appropriate and forcible language: "It is thus seen that the rule by which agents or trustees are prohibited and rendered incapable of purchasing or dealing with the property of their *cestui que trust* is one of universal application, justified by a current of strong and high authorities, and is adhered to with stern and inflexible integrity, and the consequences of such dealings and purchases is that the agent or trustee is liable at any time, on the application of the *cestui que trust*, and as a matter of course and without reference to the fairness or unfairness of the transaction, the adequacy or inadequacy of the price paid, or any other equities of the agent or trustee, to have the sale set aside. Such has been the uniform administration of the laws of England and, where the civil law prevails, and in this country. No reason is suggested why rules thus founded on the soundest morals, and which have been maintained with such uniformity and steadiness, should now be relaxed. On the contrary, it is seen from every consideration arising from circumstances surrounding us * * * forcibly demands of courts of justice a firm adherence to these principles and a stern application of them to every case coming within the sphere of their action."

On this subject Chief Justice Legrand, in 16 Md., 436, said: "The necessity of *good faith*, and that free from suspicion as far as practicable, between principal and agent, is the main pillar of support to the doctrine. The necessity of it underlies all decisions. Remembering the weakness of humanity, its liability to be seduced by self-interest from the straight line of duty, the sages of the law inculcate and enjoin a strict observance of the Divine precept, 'Lead us not into temptation.'"

The same rule is elaborately discussed and firmly held by Chancellor Kent.

See 2 Johnson Ch. R., 252.

Covington and Lexington R. R. Co. *vs.* Bowler *et al.*, 9 W. P. D. Bush. Rep., 468.

FACTS IN THE RECORD ARE TRULY PERSUASIVE OF THE ABOVE RULE.

The facts and circumstances developed by the case at bar are truly persuasive of the correctness of the rule, "Lead us not into temptation," as applied to the duties of trustees; and, for the purpose of showing what a reckless disregard the defendant, Gillett, had for this rule, I beg to call the attention of the Court to some of the facts as shown by the pleadings.

The seventh paragraph of complainant's bill states:

"That shortly after the death of said grandfather, to wit, about the month of June, 1866, when your oratrix was about seventeen years of age, she intermarried with one Harry L. Allan, who had no other means of supporting himself and wife except by his labors as clerk, book-keeper, or otherwise by his personal labors; that your oratrix hoped and believed, at the time of said marriage, that she would have been able to obtain from said executors, as she thought she had a right to, the interest which was bequeathed to her by her grandfather as aforesaid, and that for more than six years thereafter did your oratrix anxiously await and expect said executors to administer said estate, so that your oratrix could get her interest in the same partitioned to her, or at least a portion of the same & sufficient to meet her then current family necessities, which were then pressing her said husband to maintain your oratrix & their three little children, the fruits of said marriage; that your oratrix' said husband became unfortunate in business and was not able to procure sufficient employment to meet necessary family expenses, as well as being afflicted with sore eyes and about to lose his sight, when about the 13th day of June, A. D. 1872, your oratrix, at the instance of the said husband and in company with him, called on the said Gillett, who was then the acting and managing executor of said estate, and who was familiar with the condition and resources of the same, and as such had then had possession and control of the same for more than six years, as well as being familiar with the pressing financial necessities of

your oratrix & husband, and did then and there request and entreat him, the said Gillett, to let your oratrix have her portion of said estate or to arrange in some way to make the same available, so as to relieve your oratrix & husband from the then pressing wants of themselves & family, but the said Gillett did then and there refuse said request and to take any action whatever to make such interest available, except the said Gillett did then and there suggest and advise that your oratrix & husband could obtain money on her said interest by mortgaging said interest in said estate." (See Record, pages 2 and 3.)

To the above defendant Gillett answers as follows:

"To the seventh paragraph or clause in said bill this defendant answers that he admits complainant's marriage to said Harry L. Allen, as stated, and that said Allan was dependant on his labor as clerk, &c., but was competent and experienced therefor. He cannot answer as to the thoughts or expectations of said complainant with respect to the administration of said estate; that the complainant well knew the condition of said estate as to the large amount of indebtedness thereof and the nature of the property and resources for its payment; that she also well knew, as the facts were, the anxious efforts of this defendant to provide for the payment of the indebtedness to the very best advantage, not to sacrifice the lands of the estate, but to preserve them to the utmost extent possible for devisees.

"She was also informed and knew and had full means of knowing the unsalableness of the lands of the estate as a resource for the payment of its debts or as a resource to raise money upon. All the allegations that said Harry L. Allan became unfortunate in business or was unable to obtain employment to meet his family expenses, or was afflicted or affected with sore eyes to the extent alleged, if true, were unknown to this defendant, but defendant does not believe them to be true, and on his best information and belief he denies the same to be true. Defendant further says that the further statements in said bill that about the 13th June, 1872, complainant, in company with her said husband or either of them, called on this defendant and then and there requested or entreated defendant to let said complainant have her portion of said estate or to arrange in some way to make

the same available, so as to relieve complainant and her husband from pressing wants of themselves and family * * * are each and all wholly untrue and unfounded, and this defendant denies each and all of said statements in whole and in every part." (See Record, pages 23 and 24.)

The tenth paragraph of complainant's bill states:

"Your oratrix is informed and believes and so charges that at & before the 15th day of Jan'ry, 1873, the date of said purchase by Gillett, *that* your oratrix' interest in said lands was worth at least three times the value that said Gillett gave for the same at said sale, in its undivided condition, and if said estate had thus been properly administered & said interest had been duly partitioned the same would have been worth a great deal more at said time, but your oratrix charges that the said Gillett was, from his opportunities as the active executor of said estate as aforesaid, about the only person who was familiar with the value of said interest, and who had failed to inform your oratrix of the same, and who had failed to make any exhibit of the condition of said estate, and by so withholding such information and by failing to administer the same within a reasonable time, to wit, nearly seven years, the time which said executors had full possession & control of said estate before the purchase of your oratrix' interest by the said Gillett as aforesaid, whereby he, the said Gillett, did have, take, & exercise undue advantage over your oratrix and any other person in bidding in said interest and becoming the purchaser thereof at said sale and thereby obtained an unconscionable advantage over your oratrix & obtained said interest for much less than the same was in truth & in fact worth at the time of said sale." (See Record, page 5.)

To this defendant Gillett answers:

"To the tenth paragraph or clause in said bill defendant answers that statements as to the value of the interest of said plaintiff are estimative and matter of opinion dependent on facts then undeveloped and uncertain and not capable of test as positive facts, but that defendant denies, on best information and belief, that the interest of said complainant in said lands was at the time of said sale, or at any time previously worth three times the value the defendant gave

for the same; and he denies there had been any improper administration of said estate which depreciated the value of said interest; and he denies that if said estate had been administered so that prior thereto the lands had been partitioned among the devisees, said interest would have been worth more than in its then condition, but, on the contrary, it would have been of less value.

"Defendant admits his active efforts to acquaint himself with the value of the different lands of the estate and to dispose of such as were most salable to pay debts, but that information had assured him of the fact hereinbefore stated, that public or forced sale of said lands would be at such low prices as would probably absorb the whole of them without paying the debts, and it was not the belief of defendant at the time of said sale that a purchaser of said interest would not reimburse himself unless the executors were permitted to proceed with settling debts to the best advantage, and except by holding said lands a long period of time.

"Defendant denies the statement in said paragraph of failure on his part to inform complainant in regard to her interest and of all matters affecting the value thereof as fully as he had opportunity to do, and denies all concealment of any fact or matter in anywise relating to said estate, its administrators, or the nature and value of complainant's interest therein, and he denies that he did have or take or exercise any undue advantage over complainant or her husband or any other person in hiding said interest and becoming the purchaser thereof at said sale, or that he did any act whatever to cause or bring about said sale or prevent the best and fullest price from being obtained, or which could in anywise unfavorably or injuriously influence or affect the interest of said complainant and her said husband or either of them.

"Defendant further says that a fair and full recital of the circumstances of his purchase of said interest is as follows:

"That he was entirely ignorant of the borrowing of said money by complainant and her husband or of any mortgage of or trust deed upon their interest in said lands until a very short time prior to the sale under said trust deed he read the advertisement of the sale to be made of said lands by the trustee in a newspaper, the Galveston News, as he now remembers. This occurred in Harris county.

"Not only had he had no connection with said loan or

trust deed, but he was absolutely ignorant thereof until he saw the advertisement for the sale, as above stated. Defendant came to Galveston at once, and not more than two days preceding the day of sale.

"*The complainant, as he now remembers and believes, was sick and confined to her bed.*

"He saw her husband and expressed his astonishment at the fact of said trust deed, telling how he became aware of it. Said H. L. Allan replied that he had not desired to borrow the money and make said trust deed, but had yielded to his wife's importunities, as she desired to make a trip, and that it was an improvident act on their part.

"Defendant enquired as to said Allan's means of paying the note and preventing the sale, and Allan stated that sale was inevitable; that the note could not be paid.

"Defendant enquired if Mrs. Allan's relatives had been informed and appealed to, and he replied they had, but in vain. Defendant enquired if he had tried to find some one who would buy in the land or give a better price than it was mortgaged for, and he replied that he had done all he could to obtain extension of the loan and to find a purchaser for the lands who would give more for them than the amount for which they had to be sold, but without any success. Said Allan stated that they had no alternative but to permit the sale for whatever the lands would bring, and supposed the banking company, the creditor, would make them bring the debt.

"'Defendant then saw Mr. Kimball, the officer of the bank he understood had charge of the matter, so as to learn the exact situation, and hoping to be able to aid in something favorable to complainant and her husband, but was informed by said Kimball that the sale would certainly take place unless the money was paid; that the bank would give no more for the lands than its debts and didn't want them at that amount.

"Defendant then went to Mr. George Ball, his coexecutor, who was a man of wealth, and stated to him the facts, suggesting the purchase of said interest by said Ball, the motives assigned therefor being that if the bank purchased it might coerce the executors into a sale of the lands for payment of the remaining debts in a manner to injure the interest of the devisees of the testator whose interest was the object defendant had labored to secure.

"This defendant was a poor man, living with constant industry and with strict economy. The thought of the purchase on his own account had not even suggested itself to him, because he was wholly without the means therefor and had never attempted a speculation by the purchase of property for resale in his life.

"The said Ball declined on the ground that he had little confidence in investments in lands so situated, and that it would not prove profitable. *Defendant argued with him that he would not lose money*, but by waiting until lands appreciated he would be repaid. The said Ball then surprised defendant with the offer to lend him the money to make the purchase, stating that he united in defendant's apprehension that purchase by the bank might prove prejudicial to the interests of the other heirs, and that he would wait on defendant for payment until the lands could be sold favorably. Defendant had the utmost confidence in the kindness and well-meaning of said Ball, and under these circumstances made up his mind to attend said sale and bid the amount of the debt and expenses of the sale, borrowing the entire money therefor from said Ball and another party.

"Defendant, prior to said sale, saw said Allan, the husband of the complainant, and on hearing from him again that they could do nothing except to permit the sale to proceed for whatever the lands would bring, defendant informed said Allan of what had transpired with said Ball and of the said conclusion on the part of the defendant, at which said Allan expressed his satisfaction at the prospect that defendant might become the purchaser instead of said banking company, as said Allan had supposed would be the case.

"No objection whatever was suggested by said Allan to purchase by this defendant.

"No complaint was in any manner made by him of any action or omission by defendant connected with the administration of said estate or the sale of the interest of said complainant.

"No request or suggestion was made by him as to anything that defendant was or had ever been expected to do or could do to prevent said sale or be of aid or service to them.

"And defendant says that it was utterly out of his power to prevent said sale or to have caused any larger or better price to have been bid or obtained for said interest of complainant. He says that but for his presence as a bidder he

believes that the banking company, creditor, would have bought in the trust property at less than the amount of the debt, leaving a part of the debt still due and upaid by complainant and her said husband. The said Henry L. Allan was present at said sale and heard and was fully aware of the bid by this defendant and defendant's purchase of said property, and knew that the same was a purchase by defendant in his own personal right and for his own benefit and without any trust for or liability to complainant, and made no dissent thereto in any manner, but expressed satisfaction that defendant became such purchaser." (See Record, pages 29, 30, 31.

We will now proceed to show that some of the statements made by Gillett in his aforegoing answers are unreasonable and are materially contradicted by some of the exhibits attached to his answer.

The record shows that one C. C. Lewis purchased the interest of one of the heirs and forced the executors, by suit in the district court of Harris county, to partition said estate. It appears from Exhibit No. 4 (Record, page 45), that on the 25th day of April, 1877, said court rendered a decree of partition, in which it was found that executors had received for—

Sale of lands, for rents and all	$29,381 75
Upon accounts, including debts due testator	2,056 00
Making a total of	$31,437 75

Exhibit No. 2 (Record, pages 40, 41, 42, and 43) shows that sales of lands by executors during the years 1868, 1869, 1870, 1871, 1872, to the 15th of January, 1873 (dates of Gillett's purchase), were 19,444 acres, and that the amount they received for lands after the 15th of January, 1873, to the 25th of April, 1877, was only $1,248.56, which, deducted from the total amount received at date of partition, $31,437.75, would leave $30,189.19, being the amount received by ex-

ecutors for account of the estate prior to the 15th of January, 1873, the date of purchase.

The answer of Gillett (see Record, page 22) states that the indebtedness of Morgan at "the time of his death was over twenty thousand dollars."

His Exhibit No. 4 shows total amount of indebtedness, with interest to the 5th January, 1869, to be $24,395.31, to which should be added the total amount shown to have been paid by executors to the children and Kosciusko Morgan (grandchildren and heirs of testator), $2,575.76, making $26,971.24 to be deducted from the $30,189.19, amount chargeable to executors, as shown above, would still leave $3,217.85 over and above indebtedness of testator and advances to heirs prior to the 15th of January, 1873, when Gillett purchased Mr. Allen's interest; yet Gillett, in his answer to seventh paragraph of complainant's bill, in effect says that about the 13th of June, 1872, said estate was largely indebted; that he could not pay the same on account of not being able to sell the lands of the estate, and that Mrs. Allen "was informed and knew and had full means of knowing the unsalableness of the lands of the estate as a resource for the payment of the debts or as a resource to raise money upon;" and in answer to tenth paragraph of complainant's bill, hereinbefore set forth, Gillett says: "That public or forced sale of said lands would be at such low prices as would probably absorb the whole of them without paying the debts, and that it was not the belief of defendant at the time of said sale (referring to the time of purchasing Mrs. Allen's interest) that a purchase of said interest would not reimburse himself unless the executors were permitted to proceed with settling debts to the best advantage and except by holding said lands for a long period of time." In giving his reasons for purchasing Mrs. Allen's interest, Gillett in his answer further says: "Defendant then went to Mr. George Ball, his coexecutor, who was a man of wealth, and stated to him the fact, suggesting the purchase of said interest by said Ball, the

motives assigned therefor being that if the bank purchased it might coerce the executors into a sale of the lands for the payment of the remaining debts in a manner to injure the interest of the devisees of the testator, which was the object defendant had labored to secure."

The statements made by Gillett about the large amount of indebtedness of the estate at the time of his purchase of Mrs. Allen's interest, the small value of the land, and the fear of being forced to sacrifice land to pay debts and thereby injure the rights of devisees, as well as many other statements contained in his answer, are flatly contradicted by the exhibits attached to said answer. We have shown the executors had, prior to Gillett's purchase of Mrs. Allen's interest, disposed of property belonging to said estate amounting to $30,189.19, which was more than sufficient to cover all indebtedness and advances at that time.

Exhibit No. 2 shows that during the years of 1868, 1869, 1870, 1871, and 1872 about 19,444 acres were sold for cash, for payment of debts and short-time paper, and averaging about $1.43 per acre, yet on the 13th of January, 1873, when the executors had disposed of property sufficient to pay off all indebtedness, and when, as a matter of public history, the values in Texas were being increased by the wonderful growth of population, railroad building, and other enterprises, still Gillett purchased Mrs. Allen's interest in the remainder at less than twenty cents per acre, and he tells the court under oath that it was all it was worth and more than any one else would give, "and that it was utterly out of his power to prevent said sale or to have caused any larger price to have been bid or obtained for said interest." As Gillett was the active executor, who transacted all of the business of said estate, he was the only person who knew the true condition of said estate. Suppose the fact had been generally known that the debts against the estate had been paid or nearly paid and ready for partition, which was a fact, and that there remained to be divided among the heirs many

different tracts, aggregating 47,000 acres, situated in eight counties, some of them among the best counties in the State of Texas, and that Mrs. Allen's interest was 7,234 acres or more, is it reasonable to suppose that said interest would not have brought more than Gillett gave, to wit, the amount of the note and expenses of sale—say in all not to exceed $1,300, or less than twenty cents per acre?

These facts were well known to Gillett, and to no other person, as it is shown in the bill and admitted by the answer that he was the active executor, and that Ball did not give the business any attention, but relied on Gillett, and, as a matter of form, concurred in his actions. It was the first duty of Gillett to have made these facts known to Mrs. Allen, which failure is charged in his bill of complaint, and Gillett's answer fails to show that he gave her or any one else any such important information. *Suppressio veri suggestio falsi.* Gillett not only withheld this very important information, of which he was the only custodian, but the facts and figures, by a careful study of his exhibits before referred to, show that his answer in many important particulars is not true, and therefore every part of it is discredited and unworthy of belief, and especially his positive denials of important allegations in complainant's bill, and particularly such as stated in the seventh paragraph of said bill.

From the fact that Gillett was executor of complainant's grandfather's estate, in which she was largely interested, and from which she had received only the small pittance of less than two hundred dollars, as shown by the record, it was very natural that she should go to Gillett and make known to him her pressing necessities for money and request of him her portion of said estate, or to arrange in some way to make the same available, so as to relieve herself and family from pressing wants, before she mortgaged the same; all of which Gillett positively denies, and says "he was entirely ignorant of the borrowing of said money by the complainant and her said husband, or of any mortgage or trust deed upon her in-

terest in said land until a short time prior to the sale under said trust deed," &c. Now, when we consider the circumstances stated in her bill which would naturally induce Mrs. Allen to call on Gillett and request of him to make her interest in said estate available, &c., and that Gillett lived in Harris county, where the trust deed must have been recorded, and only forty miles from Galveston, Gillett's story is not very reasonable and should not be taken as true.

The facts and circumstances developed by the record in this case forcibly vindicates the policy of the law in prohibiting a trustee from acquiring any interest in the property of his *cestui que trust.* In this case the record shows that the trustee, Gillett, not only disobeyed the Divine injunction "lead us not into temptation," but, for the purpose of concealing his motives and justifying his acts, he has, to say the least, perverted the truth to an extent that should put him beyond the protection of a court of equity.

MRS. ALLEN NEVER LEGALLY CONSENTED, CONFIRMED, OR ACQUIESCED IN THE PURCHASE OF GILLETT.

In the case of Cumberland Coal Company *vs.* Sherman, before referred to, the court fully approved of the rules applicable to confirmation of sales to trustees by the *cestui que trust* to be as follows:

1st. The confirming party must be *sui juris*, not laboring under any disability, as infancy or coverture.

2d. The confirmation must be a solemn, deliberative act, not, for instance, fished out from some expressions in a letter, and particularly when the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition that the court will watch it with the utmost strictness, and will not allow it to stand but on the very clearest evidence.

3d. There must be no *suppressio veri* or *suggestio falsi*, but the *cestui que trust* must honestly be made acquainted with all the material circumstances of the case.

4th. The confirming party must not be ignorant of the law—that is, he must be aware that the transaction is of such a character that he could impeach it in a court of equity. (See 30 Barbour, 530; Lewin on Trust, 97 Law Lib., 574.)

Referring to the above rules the court said: "All these positions are confirmed by numerous authorities, and are believed to be sound law and of universal recognition." Applying these principles to the facts in this case, as shown by Gillett's answer, even if they were true, it is very clear that Mrs. Allen could not, nor did not consent to or acquiesce in the purchase of her interest by Gillett. Mrs. Allen was not *sui juris*, but a married woman, and could not consent to the sale of her land except by a deed signed by herself and husband and duly asknowledged by her in privy examination apart from her husband, as required by the statute law of Texas referred to and quoted on page 21 of our first brief. By the law of Texas the husband cannot sell his wife's land, though she may have executed to him a power of attorney for that purpose. (See Cannon *vs.* Boutwell, 53 Tex., 626.)

It is not in any way averred or shown that Mrs. Allen said or done anything to induce Gillett to make the purchase; on the contrary, his answer shows that Mrs. Allen was not at the sale, but was at home, "sick and confined to her bed," and that Gillett never saw her at any time after the deed of trust was made, or that she ever said or wrote a word consenting to or in any way confirming said sale or attempted to authorize her husband or any one else to consent to the same. Even if she had consented it would not have precluded her from recovering in this suit, unless such consent or acquiescence was made after a full and fair explanation on

the part of Gillett and for a valuable consideration, none of which is alleged or shown from the record.

Therefore, from a full and fair consideration of the facts and circumstances shown from the record, and as Mrs. Allen brought this suit within a few months of the removal of her coverture by the death of her husband, we submit that the reasons given by the circuit court in dismissing complainant's bill, to wit, "that the complainant is not entitled to the equitable relief prayed for in her bill, * * * and that the defendant has acted with the best of faith; that the purchase complained of was made with complainant's acquiescence, if not direct consent, and that the complainant's long delay in bringing this suit is inexcusable, notwithstanding her coverture, and that complainant's bill ought to be dismissed," (see R., p. 62) cannot be sustained in equity and good conscience, and that a decree should be rendered in favor of complainant as prayed for in her bill and the amendment thereto.

GILLETT HAS LONG SINCE BEEN PAID BACK HIS PURCHASE-MONEY.

Exhibit 7 (see Record, pages 57 and 58) shows that Gillett has long since sold 2,727½ acres of the land purchased of Mrs. Allen for $2,515.25. This would still leave about 4,507 acres, which land Gillett has realized as the profit made out of the purchase from Mrs. Allen, his *cestui que trust.*

A trustee or executor will not be permitted to create in himself an interest opposite to that of the party for whom he acts, nor to traffic in the estate for his own emolument.

See Faucett *vs.* Faucett, 1 Bush., 511, and authorities there cited.

In accepting the trust created by the will of Morgan, Gillett became complainant's trustee, and therefore could not purchase her interest, though the sale was at public auction.

(See *ib.*) The fact that the complainant had mortgaged her interest, with power to sell it, did not in any way change the relations which previously existed. He was still her trustee and she was still his *cestui que trust.* She had not parted with her title to the property, and Gillett, being her trustee, could not purchase it, except by a direct proceeding of a contract of purchase by dealing with each other at arms' length, at the same time Gillett making a clean breast and a full and fair disclosure of all the material facts and circumstances within his knowledge, and without any *suppressio veri*, which would affect the value of her interest; none of which was done.

Gillett's answer shows that after his consultation with Ball, his coexecutor, who had agreed to loan him the money, Gillett had then made up his mind to make the purchase without consulting the complainant, or even her husband. His answer also shows that when he went to Galveston to attend the sale he never saw complainant or had any communication whatever with her, she being at the time in her bed sick. Gillett simply informed her husband that he intended to purchase her interest, and that the husband expressed his satisfaction at the prospect of Gillett becoming the purchaser, and so expressed himself after the sale. Now, even if this had been all true, and the husband had been fully authorized to sell his wife's interest, it was not sufficient to authorize Gillett to purchase, because his answer does not show that he informed or ever attempted to inform the husband about any of the material facts affecting the value of complainant's interest, which were that the debts of the estate had been all or nearly all paid, that the estate was ready for partition among the heirs, and that complainant's interest was about 7,234 acres. Now even if all this had been done by Gillett, and the husband had then consented to the purchase, it would not have been binding on the complainant, because she was then a married woman and could not dispose of her interest, being her separate property, except in

the manner provided by the statute law of Texas. (See Cannon *vs.* Boutwell, 53 Tex., 626.) And being a married woman when the sale of her interest to Gillett was made, no limitation or delay can bar her recovery, as this suit was brought within a few months after the removal of her coverture by the death of her husband. (See Paschal's Digest of the Laws of Texas, article 4621; also article 3201, Revised Statutes of Texas.)

All of which is respectfully submitted.

J. T. BRADY,
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Counsel for Appellant.

127-589

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In Supreme Court of the United States

OCTOBER TERM, 1885.

FANNIE B. ALLEN, APPELLANT,

vs.

HENRY F. GILLETTE, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS. IN EQUITY.

STATEMENT OF CASE AND BRIEF FOR APPELLEE.

T. N. WAUL, of Counsel.

This case was set for hearing by complainant upon the bill, amended bill, and exhibits, and the answer and exhibits (Tr., 59 60), and upon the hearing a final decree was rendered for the appellee.

The court finding from the pleadings, the answer not being denied, but taken as true, and from the evidence, that the complainant is not entitled to the equitable relief prayed for in his bill; that no fraud has been shown and that the defendant has acted with the best of faith; that the purchase complained of was made with complainant's acquiesence, if not direct consent, and that complainant's long

delay in bringing her suit is inexcusable, notwithstanding her coverture, and that complainant's bill ought to be dismissed, with costs, etc. (Tr., pp. 61, 62.)

As all the facts stated in the answer in response to the bill, as a defense to the bill, or facts stated upon information and belief, which defendant would have a right to prove, are admitted as true, it may tend to the elucidation of the case to make a statement of such matters as may seem important to the appellee.

The principal facts are: that James Morgan died in the year 1886. He devised his property to seven grandchildren, pretermitting one grandson, who, from the fact that the entire property was community property of James Morgan and his deceased wife, and that this grandson was one of two heirs of his mother, who as one of two children heirs of Mrs. Morgan, inherited one-eighth of the entire property, being one-fourth of his grandmother's community share. This right was not set up and asserted by the grandson until after distribution had taken place among the seven devisees or their representatives, but when asserted could not be resisted, and was yielded to by all parties. (Tr., p. 23.)

The estate consisted of a large amount of wild lands, wholly unproductive, situated in different counties which were not improving, the lands in them not in demand; these lands generally of inferior quality and little value, and titles to a considerable part of them in dispute. The lands were appraised under oath by the lawful appraiser of the estate at 25 cents per acre. (Tr., p. 33.)

The estate owed debts exceeding $20,000. (Tr.. pp. 38, 39.)

The complainant was the oldest of the seven grandchildren. She married in 1866, at 17 years of age. The

other six children after the death of their mother, which occurred soon after Morgan's death, resided in Kentucky, with relatives able and willing to provide for their education and maintenance. (Tr., p. 24.) Morgan's will withdrew his estate entirely from the probate court, leaving its settlement exclusively to his executors. See will. (Tr., 17, 18.)

The executors selected by Morgan were first: this defendant, who resided a near neighbor to him in the country, 30 miles from Houston; a poor man, a school teacher the greater part of his life, then the manager of a "Home" for the children of deceased soldiers, maintained mainly by public liberality through his exertions; selected as executor on account of Morgan's friendship for him and confidence in his integrity, and his fidelity to the interests and welfare of these grandchildren. The other, Mr. George Ball a man of wealth and the very brightest reputation for business ability.

It is to be taken as a fact that if the debts of the estate had been paid off by forced sale, or by early sale of the lands, the entire property would have been exhausted and insufficient therefor. (Tr., p. 22.)

The policy of the executors was to induce creditors to accept lands in settlement of their debts, to offer lands for sale in small tracts to parties desiring to buy, at the most accommodating terms, so as to make the most favorable sales, and by personal influence and solicitation with the creditors to induce delay until payment could be made in this manner. Their policy was thus to pay off the debts to the best possible advantage, and to save all of the lands they could for division among the devisees, the grandchildren of Morgan, hoping that by appreciation they would become of sufficient value to give them substantial aid in life.

It is alleged, and to be taken as a fact that this policy was entirely acceptable to and approved by the relatives of

the other six minor children, who had care of them, and were providing for and educating them in Kentucky. (Tr., p. 27.)

These six children were minors, beyond the territorial jurisdiction of the courts of Texas, and without any lawful guardian.

The complainant was married to a young man of good business qualifications, in receipt of a fair salary, getting along in all reasonable comfort; and it is alleged, and to be taken as true, that the condition of Morgan's estate, its indebtedness, its lands, their value, locality, fitness for ready sale, and the policy and management of the executors were all, from time to time, explained to complainant and her husband by respondent and understood by and familiar to them, and fully and particularly explained whenever desired or sought, and wholly without any concealment or reservation whatsoever. And it is to be accepted as the fact that this policy and action on the part of the executors, well known to complainant and her husband, between whom and the defendant were frequent interviews and discussions, was never in any manner complained of, but met with their entire approval. (Tr., pp. 23, 24, 25, 27, 28.)

June 13, 1872, the complainant, not from any pressure of necessity, want or need, but in order to gratify an extravagant whim for a pleasure trip, or excursion, borrowed $1200, or rather the note of her and her husband was given to the Texas Banking and Insurance Company for that amount, at six months with 12 per cent. per annum interest after maturity, having been discounted by the bank, its payment secured by a deed of trust on her interest, the undivided seventh (as supposed and recited) in the various tracts of land belonging to the heirs of said Morgan, specifying the various tracts; and to be sold on default of pay-

ment, on twenty days notice at public auction before the court-house door of the county of Galveston for cash.

With the effecting of this loan, the making of this note, or trust deed, the defendant, Gillette, had nothing to do, and was ignorant of it. He never heard of it, or of any necessity, purpose or thought of it, until, by accident, reading a copy of the Galveston News, in a remote place in Harris county, he saw the advertisement of the sale to be made under the trust deed by Allen and wife. He hurried instantly to Galveston. It was two days before the sale was to be made. The complainant was sick in bed. He saw her husband, and expressed astonishment at such a trust deed, and inquired concerning the facts. The husband explained that it was his wife's requirement, extravagant, useless and against his judgment, for the purpose of a pleasure excursion she wished to take. Gillette enquired the means of averting the sale. None whatever. Every suggestion occurring as a possible reason was mentioned, but all had been tried and failed. Allen and wife were completely at the mercy of the bank. They had made up their minds that the sale was inevitable and might be for a less amount than the debt.

Gillette went to the bank to try, if possible, to induce an extension. The bank was inexorable. It would make the sale; would if necessary, bid the amount of its debt for the property but not a cent more; did not want the property, preferred the money; Gillette could effect nothing for the interest of the complainant with the bank.

He then went to his co-executor, Mr. Geo. Ball, and explained the situation. He said this interest in the property of the estate will be bought in by the bank, the bank will want to realize its money straight way, and will force us to make sales of the lands of the estate and close it up, which

would be to the great detriment of the Morgan grand-children in Kentucky, and entirely defeat the plans and hopes of the executors for settling up the estate and saving as much of the lands as possible for the children.

Mr. Ball recognized the difficulties, and the probable consequences. Gillette then urged Mr. Ball to become the purchaser of the interest of Mrs. Allen, to be sold at the trust sale, and argued if he would hold on to it, take care of it, the lands would come into market and appreciate, and he would not lose money.

Ball declined, said he had no confidence in the investment, but told Gillette if he was willing to take the risk Ball would lend him the money, and wait until he could repay it. He again saw the husband of the complainant, and stated that he thought of bidding for the property if the bids did not exceed the amount of the debt and costs. Allen expressed his satisfaction that Gillette should buy and become the owner of their interest.

The next day being the sale day, he again saw Allan, who repeated his willingness and satisfaction that Gillette should buy, and informed Gillette that the complainant, Mrs. Allen, hearing of his idea of purchasing, would be alike pleased. Allen was present at the sale, entirely cognizant of the purchase by Gillette, not only without objection, but with satisfaction, that Gillette should become the owner of the interest. (Tr., 30, 31.)

It is to be taken as true that defendants moving and main purpose was for the protection and advantage of the minor grand-children, the devisees of the land; and to be taken as a fact, that nothing in the nature of concealment, withholding or improper use of information ever occurred on his part, as respects the complainant, her husband, or any other person; and that, but for the plaintiff's bid, the

sale would not have brought the amount due on the land; and that the price was a fair market price at a public sale of the lands.

The sale took place January 15th, 1873, and it is to be taken as true, that with full knowledge of all the facts, the complainant and her husband at the time and thenceforward acquiesced in said sale to and purchase by the defendant, until the death of Allen in February, 1883, and such acquiesence continued by her, with relatives and friends around her, willing and able to have aided her in redressing any wrong they suspected had been done to her.

And this acquiescence, the belief on her part, in the full knowledge of all the facts that defendant's act was in good faith, and in no wise injurious to her, and with her approval atthe time, continued untilthe summer of the year 1883, when under the influence and advice of the Hon. John T. Brady, and under a champertous contract with him for a large portion of the land which he might recover, he was permitted to bring this suit.

The price paid by Gillette was reasonable, adequate and fair. This is alleged and to be taken as true, and is strongly corroborated. The lands were appraised at 25 cents per acre by the sworn official appraisers.

Lee, who had an eighth interest, uncontested, in the Gillette seventh, sold it, January 28, 1882, nine years later for $200. (Tr., p. 23.)

One of the heirs who came of age sold his interest for $1000, and Gillette endeavored to sell his interest to the same purchaser for the principal of what he had given.

This suit was brought. Twelve years had passed away. The defendant has devoted his time and the attention and labor of his life to these lands. He has in every way hus-

banded and preserved them; has looked to their development as the bulk of his little estate. Its management has entered into and controlled the plans and business of his life, great changes have taken place. We do not enlarge upon the development of this country, the progress which has been wrought, and their tendencies to enhance the value of these lands. These are matters of judicial knowledge. (Tr., .)

POINTS.

I.

The first proposition on which we wish to state clearly to the court is that this case is to be decided, not upon the law of England, not upon the law of any other State or States, not upon some imaginary theory or principle supposed to pervade this country as equitable, but upon the law of Texas, to be gathered from its statutes, if there be any, or from its jurisprudence directly and positively, if that be settled; and if not, then by what you shall conclude, in your most enlightened judgment from the analogy and spirit of her decisions, or cognate or germain subjects to be the law in Texas of this case.

Slaughter vs. Glenn, 98 U. S., 242, was an equity case from Texas. The court say: It is to be decided according to the jurisprudence of Texas. We must administer the law of the case in all respects as if we were sitting there reviewing the decree of an inferior court in that locality. Citing Olcott vs. Bynum, 17 Wal., 44.

Olcott vs. Bynum, 17 Wal., 44, that was a case in which a resulting trust was claimed under a trust sale in North Carolina. The court say:

"It is to be determined by the *lex loci rei sitae*. It is to be considered solely in the light of the statutes and adjudication of North Carolina. The court must hold and admin-

ister the law upon the subject as if it were sitting as a local court of that State." (Pp. 57, 58).

Ewing vs. St. Louis, 5 Wal., 413, an equity case. The complainant can ask no greater relief in the courts of the U. S. than he could obtain were he to resort to the State courts. If in the latter courts, equity would afford no relief, neither will it in the former.

These principles, wherever title to land in the State is affected, entering into and forming rules of real property have been recognized and enforced by the Federal Courts uniformly.

Hinde vs. Vattier, 5 Pet., 401.
Van Ness vs. Pacard, 2 Pet., 137.
Wheaton vs. Peters, 8 Pet., 591.
Kendall vs. U. S., 12 Pet., 524.
Penn. vs. Wheeling Bridge Co., 13 How., 518.
Neves vs. Scott, ib., 272.
U. S. vs. Eckford, 6 Wal., 484.
Brine vs. Ins. Co., 96, U. S., 627.
Orvis vs. Powell, 98 U. S., 177.

The applicability and necessity of this doctrine in Texas would be particularly striking in the case of a purchase by a trustee himself under a trust deed, or mortgage of lands with power of sale on default by the mortgage creditor as trustee.

It will be admitted that in "equity jurisprudence," so called, the general rule is that a trustee cannot become a valid purchaser at his own sale, i. e., to sell to himself; but from 3d Texas Reports to now, the 68th, it has been held in a great number of cases that the trustee conducting the sale with entire fairness might become the purchaser at his own sale. The reason of the English Equity rule was squarely met by the able men who laid the foundation of

equity in this state, and they held that the interest of the creditor in the property, in its producing a full price, and being made to pay at least his debt, was a public policy controlling such as grew out of his opportunity and temptation to fraud and wrong. The fraud and wrong remained open as objections. But to make their mere possibility work the positive disability of the trustee was against the best interests of justice and of society. Thousands of titles in this state rest on such scales. No lawyer would think of objecting to such a title in the state court on the sole ground of the incapacity of the trustee to purchase. And it would be a strange anomaly because the forum should be a federal court, sitting in Texas, that a different rule should obtain and such titles be overthrown.

II.

Whatever may have been the weight of authority, or the approved doctrine of courts of equity in England or in the other states of the Union, it was early settled in the state of Texas, in the case of Erskine vs. De La Baum, 3 Texas, 415, where the learned judge, after an examination of authorities, narrows down the legal proposition thus: "The " difference between these eminent jurists is this, that " Judge Story says, if a trustee to sell is the purchaser, it " is voidable at the mere will of the beneficiary. And Lord " Brougham rests it on the good faith of the transaction, " making the same *prima facie* voidable, and throwing the " burden on the agent to rebut the presumption and show " the good faith of the transaction. It has been shown " that according to the doctrine held in South Carolina, " Stallings and Wife vs. Forman. Executors anda dminis- " trators who sell under an order of court constitute an ex- " ception to the rule, that a trustee to sell cannot purchase, " and that they can purchase."

And the court adopt the opinion of Lord Brougham in the case of Hunter vs. Atkins, and such has continued to be the law thence hitherto in the state of Texas. The court say further, "the decree must have been based upon one of "two hypotheses, that an administrator cannot purchase from "the heir, however fair the transaction; or that if he does "purchase, it is with the responsibility of assuming the bur- "then of proof. It is believed that neither of the two prop- "ositions is sustained by the law, but that such contract is "to be tried as between strangers." (p. 422.)

[Acts of legislature organizing probate courts prohibiting such purchase referred to (p. 420), has reference only to sales by the administrator in due course of administration.]

Howard vs. Davis, 6 Texas, 194.

Property conveyed to a trustee for a married woman and her children; the trustee giving his notes therefor and creating a mortgage with power of sale to the mortgagee on default of payment: Held, that the mortgagee might purchase or procure another to purchase at his own sale, and if there be no circumstances to indicate unfairness, fraud or attempt to stifle competition so as to secure the land below its value, the sale cannot be impeached.

Erskine vs. DeLa Baum is cited and approved.

The fact that the trustee for sale had interest in the result of the sale lends weight to the decision.

Scott vs. Mann, 33 Texas, 725.

Mortgagee with power of sale holds the power coupled with an interest, and may purchase the property at a sale otherwise fairly made, and it makes no difference whether he makes the purchase himself, or by his agent or attorney.

The court say if it were an original question they would be induced to deny the power to purchase, but they will follow the decision of those very able jurists who so long

adorned that bench, and whose memories are and will be revered by the profession. Hemphill, Wheeler and Lipscomb.

In Goodgame vs. Rushing, (35 Texas, p. 722), the opinion is very brief. It is as follows: "In this case the court instructed the jury 'The defendant's intestate being the 'trustee of the plaintiff for the sale of the property under a 'mortgage, had no right to bid off the property himself, and 'a sale made to himself upon such a bid was void, and 'vested no title to the property in him.' This is not the law in this State. See 6 Texas Rep., 174, and 33 Texas, 725. The court misdirected the jury. The judgment is reversed and the cause remanded."

Marsh vs. Hubbard, 50 Texas, 203.

Land conveyed in trust to a surety to secure him against loss by the maker and authorizing sale on default at maturity of note: Held, that the trustee could sell and buy at his own sale, and his deed as trustee to himself passed a good title. The court say "Now under this decision of the "court can there be any question as to his right to become "himself the purchaser." 208 (citing 6 Texas, 174, 33 Texas, 725.)

Connolly vs. Hammond, 51 Texas, 635.

Sale by a trustee who becomes indirectly the purchaser of the trust property at such sale is not absolutely void, but prima facie voidable.

Erskine vs. DeLaBaum, 3 Texas, and Howard vs. Davis, 6 Texas, approved.

III.

"The c. q. t. who desires to set it aside must assert his rights within a reasonable time. Long acquiescence in the sale after the facts connected with the purchase were known, or by the exercise of reasonable diligence might have been

known, will amount to a confirmation of the trustee's action."

In Texas the rule is well established, that a party seeking equitable relief against fraud or mistake, is chargeable with laches from the time it was or ought to have been discovered.

The court say:

"The rule long since adopted in this court in regard to "sales made by trustee or agent to sell, who becomes him- "self indirectly the purchaser, is that such sales are held to be "only *prima facie* voidable." Citing Erskine vs. DeLaBaum, 3 Texas, 406, and 6 Texas 174. Nor are the courts of Texas alone in this view of the law. A strong current of authority is that such sales are valid, until set aside or repudiated by the c. q. t., who must asert his rights within a reasonable time Shelton vs. Homer, 5 Metc., 467; 5 Johns, 44.

Even in those courts, which recognize the rights of the c. q. t. or principal to repudiate the sale, his long acquiesence, after he knew or by the exercise of reasonable diligence ought to have known of it, may amount to an affirmance. Marsh vs. Whitman 21 Wall., 184; Hawley vs. Cramer, 4 Cowan, 743; Hill on Trustees, 169, 268.

In the State of Texas the rule is well established that a party seeking equitable relief, against fraud or mistake, is chargeable with laches from the time it was or ought to have been discerned. (Bremond vs. McLean, 45 Texas, 18.)

2. Bishop on Married Women, sec. 490, says: "The question is not one of power to convey. If a man can lose his lands by estoppel, when a general law authorizes him to convey them by deed, it is impossible to find a good legal reason why a wife may not lose hers by estoppel, though the general law qualifies her to convey them only by a deed executed jointly with her husband. Thus in Kentucky, where a wife at a sale of her husband's real estate,

announced that she would not claim dower against any person who should become the purchaser she was afterwards held to be estopped to claim it. "Although," said Robertson J., "her declaration to the bidders did not legally alienate "her dower, yet the sale being made on the faith of it she is "equitably estopped from asserting dower against the pur- "chaser for the inability of coverture could not exonerate her "from fraud." Connolly vs. Brantsler, 3 Bush., 702, 3, and for similar principles see Cooley vs. State, 2 Heads, Tenn., R, 605, 8. Lathrop vs. Soldirs Loan, &c. Ass. 45, Ga. 483. Bishop says: "This as a general doctrine is clearly sound in the law." Ib.

The acts of the husband were those of the wife's trustee, fixed by law with the control of the separate property. He was "statutory agent." See 2 Bishop on Married Women, sec., 399.

Citing Mitchell vs. Mitchell, 35 Miss., 103.

Mebley vs. Loophart, 47 Ala., 259.

Bolling vs. Mock, 35 Ala., 727.

O'Brien vs. Foreman, 46 Cal., 80.

Aaron vs. Booth, 8 Texas, 248.

While the law extends its protection to the rights of a married woman, it does not permit her to act fraudulently or inequitably to the injury of others. Acting on her own responsibility she may act fraudulently, deceitfully or inequitably so as to deprive her of any claim for relief in any court of equity. This results from her capacity to hold property and make contracts with which the law vests her. If a married woman voluntarily makes admissions and representations in respect to her rights of property by which others are deceived and induced to give credit to her husband on the faith of this property she will be precluded from asserting her claim against the rights of those who

have confided in and acted upon her representations and admissions.

See Chubb vs. Johnson, 11 T., 499.
Allen vs. Urquhart, 19 T., 480.
Berry vs. Danley, 26 T., 737.
Baily vs. Trammell, 27 T., 328.
Fitzgerald vs. Turner, 43 T., 79.
Ryan vs. Maxey, 43 T., 192.

IV.

It is important to ascertain with precision the nature of the trust of an executor in the State of Texas. This is well stated in the Texas Reports. ' It is a trust to pay the claims of creditors and then to restore the remainder of the estate to the heirs." Cochran vs. Thompson, 18 Texas, 656.

The estate at the death vests immediately in the heirs as the true and full owners. A qualified interest is subsequently vested in executors and administrators principally for the collection and payment of demands for and against the estate, and when the object of the trust is satisfied, the property remaining is again to be restored to the heirs as rightful proprietors.

Fisk vs. Norvell, 9 Texas, 16. (C. J. Hemphill.)

Administrator's possession of land is only constructive. Holds them only for a purpose, and that is the payment of the debts of the estate. Barrell vs. Barrell, 31 Texas, 344.

The executor is not a trustee for devisees or heirs, beyond their interest in the estate, that he will pay off its debts, and deliver to them or their assigns, or representatives their share of the residue of the estate. They are in no sense or respect under his control. It is no part of his right or duty to look after them. He is not guardian of their persons or property. What debts they shall contract, how

their payment shall be secured or enforced—their providence or improvidence are all matters to which he is a stranger. Whether or how they shall sell or encumber their interest in their estate, is none of his care. They cannot interfere with his control of the property of the estate, for payment of the debts of the estate, nor can he interfere in slightest degree with whatever else, they may choose to do with their interest in the estate. How they shall sell it, or mortgage it, whether they shall get a fairprice or make a donation of it, or be cheated out of it are all matters en tirely outside of his trust and his office. There power of disposition of and dealing with their interest in the estate subject only to the lawful purposes of administration, is absolute and in no degree subject to control or interference from the executor, any attempt at which would be an assumption and interference. The very essence of the trust of an executor is that the property of the estate sold for payment of its debts, shall be sold by him to the utmost advantage, made to bring all that his skill and fidelity can enable it to bring. But if an heir or devisee chooses to sell their interest in the estate, or to encumber it so that it must be sold to satisfy the encumbrance, it is no part of the obligation of the executor to busy himself as to the price to be attained.

When Mrs. Allen contracted her debt to the Banking & Insurance Co., and conveyed her interest in the land of the estate of Morgan, in trust, to an officer of the bank to secure the debt, giving him the power on default of payment, to sell the property at public auction to the highest bidder for cash before the court-house door of Galveston county. The executor of Morgan's estate was not her trustee in relation to that transaction, or its consequences, and was not under any disability to become fairly and honestly the purchaser at the public sale.

This is sustained by the great weight of authority and by sound reason.

Prevort vs. Gratz, Peters C. C. R., 364, Gratz was executor of Crogham, and the suit was brought by heirs of Crogham to set aside the title to lands of Crogham's estate alleged to have been acquired by Gratz in violation of his trust as executor. With respect to certain lands held by Gratz and sold by him, so that the lands were purchased for him by the court, Judge Washington says: Nothing can be more just than the principles which govern a court of equity in relation to purchases made by the trustee of the trust property. He pledges his honest endeavors to protect the interest of the c. q. c. by renting of the property on the best terms that he can obtain, as equity will not permit him to create an interest in himself inconsistent with this pledge, and which may seduce him from an upright fulfillment of his duty. Whatever profit is gained by this sale belongs to the c. q. t., and the trustee can never purchase or hold the property discharged of the equity of the c. q. t., to call upon him in a reasonble time to account for this profit, or to have a resale."

We have quoted this *in extenso* to show that this most able and eminent Federal judge in the construction which he subsequently recognizes, had in his mind the full strength of the equity rule on this subject.

There were certain other lands belonging to the estate of Crogham, which wear sold under a judgment recovered against Crogham, by one Spears, at a sheriffs sale under execution, and bought by Gratz "for the profit made upon which, it was contended, that he ought to account." Judge Washington said, (p. 378) "I conceive that the rule laid " down in respect to the Tenederah lands does not apply " to this case. I know of no principle of equity which will

" invalidate the title of a trustee to land which the law has " taken out of his hands, and which he purchased from one " appointed by the same authority to sell it. This is pre- " cisely like the case of an executor who purchases at a sher- " iffs sale the personal property of his testator seized and " sold under execution. The reasons which forbid a trustee " from purchasing the trust property where he himself is " the seller, do not apply to such a case."

Other parts of the case show that Gratz had no funds of the estate—no means of buying for it—therefore committed no fraud on the estate, and the principle of the decision is that because he was the executor of the estate, this could work no inability on his part to become the good faith purchaser of property of the estate sold not by him, but by the agent of the law, and therefore taken out of his hand for its legal disposition.

The case goes beyond the case at bar. If the judgment had been against Morgan's estate, and consistent with our law, a sale of lands had been made by the sheriff for its payment, and Gillette without any funds or means of the estate to pay it, acting fairly and being the highest bidder, he might legally have been the purchaser.

And, why not? The reasoning against it is most artificial and arbitrary. The party who has known most about the lands shall not bid. Why? Because he may commit fraud. The reasoning is the same which excluded all parties with any interest in the result of a case from testifying in it, because of the temptation to perjury. The doctrine is a folly and a superstition which an enlightened judiciary is obliterating. Twin-Lick Oil Co. vs. Marbury, 91 U. S., 587.

Fisk vs. Seiber, 6 Watts & S., 18. The syllabus of the reporter is thus: "The assignee of an insolvent debtor is " not incapable by reason of his fiduciary character, of be-

" coming the purchaser of the debtors real estate when sold " by the sheriff upon a mortgage which cumbered it before " the time of its assignment." The case is most elaborately discussed, one of the judges, Roger J., dissenting—the assenting judges Ch. J. Gibson, Houston, Kennedy and Sergeant. It will repay careful perusal. It reviews the entire English and American decisions to that date, and it stands upon reason which we believe more and more will commend itself to the enlightened judicial world. Part of the opinion we will quote. After referring to the decision Judge Washington, here referred to, the court say:

"Where the debt for which the property in such cases is " taken in execution is just, and the property liable to the " payment of it, and the trustee without funds or by bonds, " or power to pay it, so as to relieve the property, what can " he do? He is certainly not required to advance moneys " out of his own pocket for the purpose of redeeming it, and " it being taken out of his possession, as it were, and certain- " ly out of his power, by the authority of the law, which is " paramount to any that he has as trustee, and placed in the " hands of the officer of the law to whom full power is given " to sell and dispose of the same, it is perfectly manifest that " he thereby becomes divested of his trusteeship in regard " to it, that all his power and interest in it ceases so that he " has no duty whatever to perform in respect to it incompati- " ble with his buying at the lowest price for which it may " be obtained, and as to the sale to be made by the sheriff it " is impossible to conceive how the trustee can exercise any " control or influence over it to the prejudice of those whose " interest it is to have the property sold for the highest pos- " sible price that any other individual disposed to buy may " not exert. * * It is not even his duty to attend the

" sheriff's sale in such case, or to give any attention to it " whatever. * * p. 23."

Cadbury vs. Duval, 10 Penn. St. R., 265.

A testator made various devises of his property, and appointed his wife executrix. He devised certain lands to trustees with power to sell them to pay debts not otherwise provided for. The trustees sold a part of these lands to the executrix, and the heirs sought to impeach her title. The court say: "That the vendee as executrix tended in no degree to impeach the title. It is very true a trustee can not purchase at his own sale except subject to the condition of avoidance at the pleasure of the c. q. c. for the policy of the law forbids that the seller should also be buyer, when the interests of third persons may be involved. 2 R, 392, 7 W. & S., 152. But where an executor or administrator stands unconnected with the trust there is no possible reason for denying him the right of becoming the purchaser from the trustee. *Cessante ratione cessat lex.* For the same reason he is not considered as within the policy of the prohition, where, before the sale to him, the trust has been determined, (7 Barr, 50), or where the subject of it has been taken out of the hands of the trustee by an agent, acting by paramount authority; or, for instance, where the sale is by the sheriff, by virtue of legal process, against the creator of the trust. 1 P. C. C., 373; 6 W. & S., 18. Here Mrs. Duval was an entire stranger to *the trust to sell*, and consequently at full liberty to buy. (272).

Here the executrix was charged with the general duty of paying debts out of the estate. The lands devised to trustees were to be sold by them to pay debts not otherwise provided for. The argument was, of course, very easy, that the executrix if she could have the capacity to buy in the lands would have a notice not to pay off debts

with the general estate, and that such capacity was inconsistent with her trust position. But this is too refined and remote. The court would scrutinize her fair dealings, but she was not the *trustee of that trust*, nor under any disability to become a good faith purchaser.

Chorpennings Appeal, 32 Penn. St. Rep., 8 Casey 315.

The syllabus is as follows: "The rule that a party will " not be allowed to purchase and hold property for his own " use and benefit to which he stands in a fiduciary relation if " contested by the c. q. c. is inflexible without regard to the " consideration paid or the honesty of the intent. But the " rule does not apply when the sale is made by a public " officer under proceedings adverse to the interest of the " c. q. c., and the trustee has not the means in his power " to prevent the sale."

" Therefore, a guardian without funds in his hands may " lawfully become the purchaser, for his own use, of his " ward's real estate. Sold by the sheriff under a judgment " against the personal representative of the ward's ancestor."

This, too, is evidently a much stronger one to imply an inhibition to the purchase than the one before the court.

Blackmore vs. Shelby, 8 Humph., Tenn. R., 438. The syllabus is as follows:

" A purchase by a guardian from his ward during minority, of the ward's property will not, as a general rule, be permitted to stand; but the case is different when the property of the ward is sold under the decree of a court of competent jurisdiction, and the guardian may then purchase, and, although his conduct will be watched with jealousy, yet if it be manifest that he has acted fairly with the utmost good faith, and the transaction is free from any imputation of a design on his part to gain a benefit to him-

self to the prejudice of the interest of his ward, the purchase will be held valid."

And see Elrod vs. Lancaster, 2 Head's, Tenn. R., 576.

In Fisher's Appeal, 34 Penn. St. R. (10 Casey 29), the court say: "Dougherty was a special agent of the estate of Kerns, appointed under the directions of the will 'to be employed as occasion might require, to look up my lands, to ascertain their value, and assist my executors to sell them.' He necessarily, if appointed under this clause, became the special agent of the executors in regard to the real estate of the testator. I know of no rule of law that would have disabled the executors from selling, at a fair price and for full value, any of the lands which they had power to sell, to Dougherty, even while he was thus acting. He could not control the sale, and if there was no fraud there is no law nullifying it." (Tr., p. 37.)

The cases in South Carolina deserve a careful reading by one desirous of sound, practical and enlightened views of the public policy which underlies this subject. After great consideration of the subject and conflicting views by their judges; the Supreme Court, in a full review of the cases, decided that an executor or administrator was not forbidden by his character as trustee from purchasing property of the estate at his own sale, for a fair price and in good faith.

Stallings vs. Foreman, 2 Hill's Ch., 401.

To set the subject at rest a statute was passed declaring their competency to purchase, subject to the right of the court to debit items with a fair price, if the price did not appear to be fair.

Such an issue is wholly outside of this case, but some of the observations of the court of that State strike us as well worthy of consideration, and not without incidental bearing on the case now before this court.

In Huger vs. Huger, 9 Rich. Eq., 225. See opinion of Dargan Ch., on pp. 225, 226, valuable alike for its law and logic.

In Alabama the rule is well settled that the executor or administrator having an interest in the estate is permitted to be a purchaser of the property of the estate at his own sale fairly conducted.

Ferguson Ex. vs. Lee, 42 Ala., 25, and see 4 Porter, 283, 6 Ala., 894; or Ala., 301: 36 Ala., 623.

It is to be observed that the tendency of modern decisions, even as to purchasers by executors and administrators at their own sales, is very strongly against the "stern policy" of the earlier decisions on that subject. The most recent writer on Executors and Administrators (1883), Schouler, § 358, thus states the doctrine:

"The earlier and more conservative rule, is that an exe-
"cutor or administrator cannot be allowed to purchase from
"himself any part of the assets, even though making a con-
"duit of the title through some third person, but he shall
"be considered in such transactions a trustee for the per-
"sons interested in the estate, and shall account to the utmost
" extent for any advantage made by him of the subject so
"purchased. And hence a sale by the representative to
"himself of personality belonging to the estate has been
"treated as fraudulent *per se*, even though made at public
"auction, at a fair price, a third person being the nominal
"bidder to whom the immediate transfer is made. But the
"preponderance of american decisions tends rather to the
"conclusion that a purchase of assets by the executor or
"administrator, or his taking and accounting for the same
"at their appraised values, may often be really advantageous
"to the estate, and that such advantage is, after all, the
"main thing to be considered. They hold that at all events

"a purchase by the representative is not absolutely void, "but voidable only by persons interested in the estate at "their option, nor even by them, if they have directly "sanctioned or acquiesced in the transaction, or if, from "their laches and delay, acquiesence on their part may legally "be fairly inferred to the quieting of title. The sale will be "treated as essentially valid until avoided, and while any "party interested may apply to have the sale set aside, not-"withstanding the acquiesence of the others, it is not for a "stranger to exercise any option in the matter.

V.

An examination of the cases relied on by complainants do not by their force or tendency destroy the defence herein. The case of Quakenbosh vs. Leonard, 9 Paige, before Chancellor Walworth, is judiciously put forward as the case which, after, no doubt, the most diligent research is considered, nearly in point. But the court will see its entire inapplicability, amounting to no more than this: That if Gillette, with ample means of his testator, Morgan, to pay Morgan's debts, had bought up mortgages or claims against Morgan at a discount he could not, in equity, be allowed more than he paid. That is the case simply, and nothing beyond it.

In the case of Michaud vs. Giraud, 4 How., 503.

Two executors combined with parties to make purchase of the property of the estate,, at their own sale, for their own benefit and conveyed to them.

The court said:

"Such transaction carries fraud upon the face of it. The "rule of equity, in every code of jurisprudence with which "we are acquainted that a purchase by a trustee or agent "of the particular property of which he has the sale, or in

"in which he represents another, whether he has an interest "in it or not, carries fraud on the face of it. In this instance "Largnel & St. Felix were the instruments of the execu "tors. They bid off the property, paid nothing, received "titles, and conveyed what they nominally bought to the "executors. P. 553.

"Says; the equity laws in England and the United States, "sustain the doctrine to the fullest extent of the incapa- "bility of trustees and agents to purchase particular prop- "erty for the sale of which they act representatively, or "when the title may be for another." P. 554."

Sums up the doctrine. "It therefore prohibits a party "from purchasing on his own account that which his duty "or trust requires him to sell on account of another." P. 555.

Gives result of Davene vs. Fanning, 2 Johns Chy., 252. If trustee or person acting for others sells the trust estate and becomes himself interested in the purchase, c. q. t. are entitled as of course to have the purchase set aside and the property re-exposed for sale under the direction of the court.

And it makes no difference in the application of the rule that a sale was at public auction, *bona fide*, and for a fair price, and the executor did not purchase for himself, but that a third person, by a previous arrangement with the executor, became the purchaser for the wife of the executor.

The purchase is void and will be set asid at the instance of the c. q. t., on the ground of the temptation to abuse and the danger of imposition inaccessible to the eye of the court, 556, 7.

Says: if trustee for one not *sui juris*, sees that it is necessary for estate to be sold is ready to give more for it than any one else, a bill should be filed and he should apply to

the court by motion to let him be a purchaser. That is the only way he can protect himself. There are cases in which the court will permit it.

5 Vesey, 678; 13th Vesey, 601.

I Ball & B., 418.

Stephen vs. Beall, 23 Wal., 329.

Trust deed for benefit of minors, etc. One Stephen was trustee and sold the property. Crowley was the purchaser and sale confirmed. Subsequently conveyed to Stephen, thirteen years after the court sustained the title of Stephen.

"There being no understanding or agreement between the "purchaser at the public sale and the trustee making the "sale, no collusion between them, no fraud in fact, the duties "of the trustee as respect to the sale being ended, his doings "confirmed by the court having the subject in charge, does "the circumstance that years afterward the trustee bought "the property from the purchaser in good faith and for a "fair price vitiate and annul the public sale to the purchaser. "It *would be a great straining of a good principle to hold* "that a purchase by a trustee from the purchaser at a public "sale under the circumstances before us is necessarily fraud-"ulent;" p. 340.

Reaffirms the doctrine that trustee cannot become purchaser of the trust property, meaning plainly at his own sale.

This is an apt expression, "Straining of a good principle."

The bank was a purchaser. The trustee under the trust deed had an absolute right of sale. Suppose he had bought in. Suppose Gillette had then bought from him.

The summary of the rule is thus laid down in 1 Lead. Cases in Equity, 260. "A trustee is not under an absolute disability to purchase the trust property from his c. q. t. (3 Md., 409; 16 Iowa, 284; 1 Wharton, 362, 375), but all such transactions are scanned in a court of equity with the

most searching and questioning suspicion, and will not be sustained unless they fully appear to have been in all respects fair, candid and reasonable. The trustee must show that he took no advantage whatever of his situation; that he gave to his c. q. t. all the information that he possessed or conld obtain upon the subject; that he advised him as he would have done in relation to a third person offering to become a purchaser, and that the price was fair and adequate, and that the onus of proving all this is upon the trustee." (4 Cald., 487; 4 How., 503; 2 Gill, 99; 12 Md., 388, 417; 9 Wis., 370).

When it is said that the trustee may not purchase the trust property the meaning must be understood to be that the trustee may not purchase from himself, for there seems to be no rule that a trustee may not purchase from his c. q. t. However, a purchase by the trustee from his c. q. t. is at all times a transaction of great nicety, and one which the courts will watch with the utmost diligence.

Sale of the c. q. t. to trustee sustained when entirely fair and it appears that it was the intention that trustees might buy and relation be dissolved.

Beckett vs. Tylor, 3 McArthur, 319.

Graves vs. Waterman, 4 Han, 687, S. C., 63 N. Y., 657.

If the trustee previous to the purchase has distinctly and honestly removed himself from the character of trustee his purchase may be sustained. Note to Whichcote vs. Lawrence 3 Vesey, 752, citing:

Downs vs. Grazebrook, 3 Merivale, 208.

"While he continues to be a trustee he cannot, without "the express authority of his c. q. t., have anything to do "with the trust property as a purchaser. In order to make "the sale in the present case a valid transaction, it is there-

"fore incumbent on Mr. Grazebrook to show that he had "such authority to become a purchaser at that sale.

Downs vs. Grazebrook, 3 Merivale, 208.

An agent or trustee may buy if his principal or c. q. t., being fully informed of it, is willing.

Woodhouse vs. Moodith. 1 Jack., & W., 222.

Trustee may buy the trust property with consent of *cestui que trust.* Lead. case in eq., 239.

This is the general doctrine. The trustee in the case of express trust may buy by the consent of the c. q. t.

VII.

We submit to the court that every element exists in this case to sustain and uphold this purchase by the defendant construed in its strictest light.

I. All information in regard to the estate, its value, its want of availability, the difficulties of sale were fully given from time to time by the defendant to the complainant and her husband. There was no concealment; nothing withheld, she knew the lands; the number of acres; the locality. She set them down in her mortgage. The defendant had done all in his power to prevent the sale and to extend the time for sale. Not a finger can be placed upon the neglect of any duty by the executor in imparting to her his understanding and information in regard to the estate.

II. The defendant was wholly disconnected from her, by the conveyance of her interest in trust to a trustee as a security for money borrowed by her. Ignorant of it, or of any reason, intention or desire therefor by her. Ignorant of it until two days before the sale was to take place.

III. The defendant took no advantage whatever of his position, not of complainant or of her husband, not of the bank, not of the public, not of any one. Ingenuity cannot

make a suggestion of any single fact or circumstance tending to show a desire to obtain any advantage.

IV. Not only did he take no advantage but he did all in his power to avoid and prevent the sale, and render it as favorable as possible to the complainants interest. He gave all the counsel and aid he could to her husband, she lying sick in bed. He went to the bank to do all he could to obtain delay and indulgence from the bank. He went to Mr. Ball to induce him to become a purchaser, stating the defendants circumstances. Counsel can suggest nothing that he omitted to do in the line of his duty or in the line of kindness and fidelity to the complainant. He came here at a distance from his home—to another county—beyond his duty—anxiously and actively endeavoring to do anything he could to arrest the sale and thus to make her share bring the best price possible. He states on his oath his belief, and it is accepted and taken as a fact in this case, that but for his bidding the bank would have been the purchaser below the amount of its debt.

V. He gave a fair price. It was an undivided seventh in one of the tracts of land belonging to an estate not yet fully administered. The sale was public and advertised. No one would give so much. The bank would have made the property pay its debt, if necessary to bid that much, but did not want it. Allen and his wife had abandoned all hope of its paying more than the debt. This result, of course, was based on the belief that its market value was not greater. The sales of other heirs were at a less figure. Ball, the other executor, did not consider it a prudent investment to return his money and interest. Defendant offered to sell his purchase at what he gave and a less rate of interest. Would have sold for that at any time from 1872 to 1877, when the partition took place. The answer

alleges the price to have been fair and reasonable at the time, which concludes the question as to that fact in the case.

VI. Defendant bought with the knowledge, consent and agreement of the complainant and her husband. And in such a matter and under the circumstances her husband was her reprepresentative and his act in good faith would be hers. Here was a trust sale of her property about to take place, the care, custody and management of the separate property of the wife devolves by the law of this state, on the husband. It was part of his legal authority and duty to cause the property to bring the best price at the sale. And in declaring his approval and satisfaction of a purchase to be made by the defendant, the law would give effect to his act as her representative.

2 Bishop on Married Woman, § 399.

The answer alleges the information and belief of defendant's from what Allen informed him that the consent and acquiescence of the complainant herself, was given to the purchase by defendant.

We repeat that the case has every element which the sternest equity has ever exacted to uphold the purchase by a clear acknowledged undisputed trustee.

VIII.

The expression is used in some of the authorities that the action must be such as to release the trustee from his situation as a trustee in the transaction.

This applies directly to purchases by the trustee from the c. q. t. Such purchases must be made under circumstances showing that the relations of trustee and c. q. t. are not existing at the time; that the c. q. t. did not, in the transaction, recognize the trust character, but dealt with him not as trustee.

All the facts here bring the case fully within the spirit and intention of that rule.

Complainant contracted this debt without any respect whatever towards the defendant as executor.

She made another trustee of her right and interest in the estate, and gave him absolute power for the enforcement of the trust.

The law of Texas vest the *legal title* to property of the deceased on his death in *the heirs*. There is a right of administration in the administrator or executor, which is a *power of sale* for payment of debts; but this is a mere *power* and not a *title*.

In Texas, as elsewhere, a testator may devise the legal title to his property in his executor for purposes of administration; but Morgan did not do this. He devised his property to his survivors or heirs.

The power of sale etc., by the executor is the legal power by the law of administration, and not any power which vests from the conveyance by the will of the legal title to the executors.

The undoubted state of the case then was, that the legal title was in the devisees or heirs.

Legal title to her 7th interest of Morgans estate was in Mrs. Allen; power of sale for purposes of administration only in the executors. Trust deed by Allen and wife to a trustee for the bank with power of sale and conveyance thereof.

It is very clear that the only trust left, or existing in the estate with respect to this right or interest of Mrs. Allen, is simply in behalf of the estate, that it should, if necessary, pay the debts due Morgan's estate in proportion to its share.

There was no legal title and no equitable title, and no legal or equitable duty otherwise in the executor.

The principles we have been discussing applies to cases where the express and undoubted trust relation exists between the parties.

We maintain that where, as in this case, the legal title to the property was in the c. q. t., the executor having only a power of sale to pay debts of the estate. Where a devisee of the estate with her power of disposition, makes a conveyance of the property to secure a debt of her own, authorizing its sale at public auction, constituting another trustee for that purpose, then there is no trust relation to prevent the executor; acting with entire fairness and good faith, paying a fair value, having no money of the estate of devisee from becoming the purchaser. The decided weight of authority and the clear reason are in favor of that doctrine and for a determination of the reason of the law and the advanced jurisprudence in matters of trust, we refer, with confidence, to the case of Twin-Lick Oil Co. vs. Marbury, 91 U. S. Rep., 587, as founded upon principles and reasons that can not be refuted, and the defendant can equally invoke an application of the same equities in this case.

IX.

In conclusion, without sifting complainant's brief, admitting the skill and ingenuity exercised in its composition, the present case neither comes within its reasoning nor its authorities, the hypotheses upon which it is based are at war with the sworn answer, as admitted by complainant, and not one fact is shown or relied on, tending to prove an advantage obtained or sought by defendant, or that any loss has been sustained by complainant, through any advice, suggestion or act of his. By the submission of the cause she says: I admit there was no fraud, that my interest in the estate I took from the custody of defendant, appointed

another trustee with absolute power to sell, having received its full value in a loan of money; that I well knew what that value was, that defendant did everything in his power to prevent the sale, the he had no money of mine or of the estate to purchase at the sale; that had not the defendant purchased there would probably have been a sacrifice of the property, and a balance left unpaid; that the purchase by the defendant was favorable to the other devisees; that I was well acquainted with the situation of the estate and satisfied with its management, and consented to the sale and was satisfied when defendant became the purchaser, and so remained until informed many years after by counsel that there might be a speculation for both of us by alleging that defendant was my trustee and that he purchased the estate for my benefit. And this is the equity of the case, which is submitted to the consideration of the court.

T. N. WAUL.